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FILED
DEC 15 1958
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No. 474 and No. 394 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1958

CLINTON GARDNER, PETITIONER

v.

UNITED STATES OF AMERICA

ALASTAIR KYLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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By order dated October 16, 1958, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari in No. 394 Misc. to and including November 16, 1958. The petition for a writ of certiorari in that case was filed on November 14, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

No. 474:

Whether the trial court improperly limited redirect examination of petitioner Gardner.

No. 394 Misc.:

1. Whether there was sufficient evidence to show a violation of the mail fraud statute.

2. Whether, as to Kyle, there was reversible error in the refusal of the trial court to permit Kyle's counsel to ask petitioner Gardner if his estimate of prospective mail receipts was made honestly and in good faith.

3. Whether remarks made by the United States Attorney in summation were improper and constitute reversible error.

STATEMENT

Petitioners Gardner and Kyle and the corporation of which they were the officers were charged, in a seven-count indictment, with conspiracy and six substantive violations of the mail fraud statute (18 U. S. C. 371, 1341, 1342). The indictment charged that from June 1955 to the date of the indictment (August 3, 1956) the defendants committed fraud and obtained money by the mailing of false and fraudulent circulars selling and offering to sell mem-

bership in a toy club known as Toys of the World Club, Inc. The fraudulent statements contained in the circulars were alleged to be (1) that defendants had a present supply of toys for the subscription period, when in fact defendants knew they had no such supply of toys; (2) that they were able to make full refund to any dissatisfied subscriber, when in fact they knew they were financially incapable of making any refunds as promised; and (3) that certain eminent persons had endorsed the plan, when in fact they had no such endorsements. The first six counts each charged a separate mailing to a named person during the period June through December 1955. The seventh count charged a conspiracy among the defendants to execute their fraudulent scheme through the mailing of circulars and "lulling" letters and cards to named subscribers (R. 1188–1195). Petitioner Kyle was the president and petitioner Gardner was the secretary-treasurer (later the secretary) of the corporate defendant (R. 42). Petitioner Kyle was convicted by the jury on all seven counts (R. 1140) and sentenced to a year and a day on each count, the sentences to be served concurrently (R. 1169). The corporate defendant was convicted by the jury on all seven counts (R. 1141–1142) and fined $200 on each count, a total of $1,400 (R. 1169). Petitioner Gardner was acquitted by the jury on the six substantive counts and convicted on the conspiracy count (R. 1140–1141). He was sentenced to six months imprisonment (R. 1169). The convictions were affirmed on appeal. The corporate defendant has not petitioned for review.

At the trial, there was testimony that petitioners had organized the co-defendant corporation (R. 45–47, 690, 692–697) and mailed out brochures and letters advertising a subscription plan (R. 81).[1] This plan called for payment of a subscription or fee on a 3-month ($7), 6-month ($12) or 12-month ($22) basis, in exchange for which the subscriber would receive a distinctive toy from a foreign country for each month of the subscription period, and in addition would receive a free introductory toy, a Tyrolean Village block set (R. 188, 315). It was promised in the brochure that this toy would be mailed to the subscriber at once, and that, if it did not satisfy the subscriber, he could demand a full refund for any toys not already shipped (R. 882–884). It was also represented in the brochure that the corporation had an advisory panel which would approve the story pamphlets that were to accompany each toy and describe its background (R. 484, 487).

Over seven million brochures were mailed out for the period June to December 1955 (R. 83, 104, 158, 837) and about $385,000 was received in paid subscriptions (R. 553, 575, 576, 634, 940). In June 1955 the business, eight months old, was operating at a loss of about $42,000 (R. 546, 548) and was in default to its trade creditors and to subscribers of a former plan (both on the bonus toy and on toys subscribed

[1] One of the mail circulars read in part:
"I have a valuable gift imported from abroad for some youngster close to your heart, and that as a member of the Toys of the World Club, Inc., the child you name will receive a carefully-selected and distinctive toy each month" (R. 1167).

for) (R. 310, 313, 317–323, 467, 468–469, 472, 474, 475). By October 1955, the corporation's deficit was $264,000 (R. 552) and it was out of cash (R. 553, 945–946). By December 1955 the deficit was $355,000 (R. 556). During this period, circulars continued to be mailed (R. 466, 506–507). The subscribers who testified stated that they had not received all the toys they had paid for (R. 478, 511, 525, 540, 589, 599, 665, 615). Two types of letters were sent out to complaining subscribers. The difficulty in obtaining a particular type of wood required for the toys and delays in manufacture abroad were cited as the reasons for not sending the toys (R. 476, 477–478, 522–523, 662, 926–930). There was testimony that the petitioners were unable to prepay for the toys to be imported by placing letters of credit with the manufacturer abroad in accordance with their agreement, and that petitioners knew that without such prepayment there would be no toys available for the subscribers (R. 213–226, 248, 400). There was evidence that the petitioners were unable to pay the printer for their brochures and contracted with a new printer as a result (R. 105–110, 122–124, 161–163, 166–168); that numerous checks in large amounts offered in payment of trade debts and toys were returned for insufficient funds (R. 47–51, 194–195, 268); and that the company on many occasions stopped payments on checks (R. 111–112, 117, 165, 311–313, 317–323). In October 1955 the corporation was unable to pay the employees' quarterly withholding tax (R. 381). Some of the subscribers who testified demanded refunds (R.

513, 526, 593, 599, 615, 661). Of these, some did not receive refunds (R. 513, 599, 615, 665): Others received at least a partial refund after repeated requests (R. 526, 593). In November 1955 alone, over three million brochures were mailed although payment on a check sent to pay for the toys was stopped (R. 85, 156–158, 229, 466, 994). In December 1955 petitioners took over $118,000 of subscribers' checks to a check cashing agency where they falsely certified that they were the sole stockholders (R. 273–304, 838–839, 861). They then deposited some of the proceeds in a noncorporate account in a Canadian bank (R. 387–388, 394–396, 500–501, 915–926, 984).[2]

Further testimony concerning petitioner Gardner showed that he was an officer of the corporation until December 12, 1955 (R. 303); that he received a total of $10,000 in salary or fees from the corporation, including payments as late as December of 1955 (R. 814–815, 855); that he never paid for the stock of the corporation which he held (R. 698, 854–855); that he helped draft and mail the brochures and the letters to the subscribers (R. 95–97, 99, 108, 176, 316–317, 325, 391, 700, 705, 767, 878–886); that he employed his talents as a mail expert to conduct an intensive campaign and to estimate the returns (R. 391, 695, 697, 700–712, 720–721, 731–732, 734, 773–779, 781–792,

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[2] In his petition for a writ of certiorari, petitioner Kyle attempts to show how the money in the Canadian bank account was disbursed. He excuses the failure of the defense to introduce such evidence at the trial by averring that the Government went beyond the indictment in showing the transfer of funds received from subscribers into a noncorporate account in the Canadian bank.

793–796); that he stopped payment on corporation checks (R. 905–909); and that he made loans for three months to the corporation at 80 percent interest per annum, which were never repaid (R. 801–802, 803, 823–825, 886), and drew up a memorandum of its financial condition (R. 895–903).

In submitting the case to the jury, the trial judge charged, *inter alia* (R. 1129–1131):

> The mere fact that the corporation did not or was unable to perform its obligations or promises, or that the subscribers suffered losses would not in and of itself constitute a crime as to any defendant.
>
> If you find that a defendant acted honestly and in good faith, this would be a complete defense.
>
> If you find that such defendant was justified in his belief that the promises could be performed he or it should not be found guilty.
>
> However, if the plan had so clearly miscarried by the time the circulars were mailed in the fall of 1955, that a defendant could no longer have believed in its success, you would be warranted in concluding that the promises of performance were fraudulent.
>
> This brings me to the element of intent. The finding of an intent to commit a fraud or to make a false promise, is an essential element of the crimes charged herein. Without intent there would be no crime.
>
> In addition to the promises alleged in the indictment, the Government has submitted other evidence seeking to establish intent including alleged false statements pertaining to

the difficulty in obtaining wood in Austria and ownership of the stock of the corporation.

The question of the intent bears upon the knowledge that the defendant had of the matters relating to the promises. Knowledge need not be established by direct testimony, knowledge may be obtained by personal observation or inferred from circumstances.

A person is supposed and required to know matters pertaining to his own business. One who makes representations or promises not knowing whether they be true or false, cannot be regarded as innocent; or a positive assertion of the facts is by plain implication and assertion of knowledge concerning the facts asserted.

It is not necessary to constitute a fraud that an individual making a false statement should know precisely that it is false. It is sufficient if it be false and if he made it recklessly and without an honest belief in its truth or without reasonable ground for believing it to be true.

ARGUMENT

1. Petitioner Gardner was the only witness for the defense. After eliciting testimony tending to establish his character (R. 670–689), his counsel questioned him about his other activities, including his relations with Monthly Publications, Inc. (R. 690, 737–739). The defense tried to establish in petitioner's behalf that he had little active connection with Toys of the World Club, Inc., and that for the period in question his other activities would not have left him much time to devote to the toy company (R. 719, 739–740, 743–753, 760–767, 770–773, 779–781,

792–793, 798, 806–809, 1028). On cross-examination, the United States Attorney asked petitioner if he had stated in a letter written in November 1955 that Monthly Publications, Inc., was dormant. Petitioner admitted he had and that the statement was true (R. 868). On redirect examination, counsel for petitioner Gardner offered the certificate of incorporation for Monthly Publications, Inc. This was objected to (R. 967). The court inquired whether there was a dispute over the existence of Monthly Publications, Inc., to which defense counsel added "or what he did" (R. 967). The United States Attorney answered "No question at all" (R. 967). Defense counsel then asked petitioner to tell some of the things he had done for Monthly Publications, Inc., in early 1955:

> Q. Now, in the early months of 1955, did you do any work for Monthly Publications?
>
> A. Yes.
>
> Q. Did you spend a substantial part of your time on that work?
>
> A. Yes.
>
> Q. Tell us some of the things you did, Mr. Gardner. [R. 969–970.]

The United States Attorney objected as to the relevancy of the question (R. 970). Counsel for petitioner Gardner stated that unless the United States Attorney would concede the correctness of the statement on direct as to the amount of time spent on Monthly Publications, Inc., he was prepared to offer proof (R. 970). The United States Attorney argued that the only question was whether petitioner said one thing on the stand and another in the letter, which

constituted an attack on his credibility (R. 970–971). The trial judge thereupon upheld the objection (R. 971). Counsel for petitioner then said that he "was intending to interrogate the witness in some detail about the work he did for Monthly Publications, Incorporated throughout the year of 1955."

> The COURT. I take it there is no issue on that.
>
> Mr. DEUTSCH. There is no issue at all. It is merely the contradictory statement of the witness, going to his credibility.
>
> Mr. HART. May I respectfully ask your Honor to instruct the jury that Mr. Deutsch's references to a contradictory statement does not establish that such a contradictory statement was made, does not establish that such a——
>
> The COURT. That is true, any claim made by counsel does not establish that the claim has been sustained.
>
> It is for the jury to determine from the evidence whether it has or not. [R. 971.]

Petitioner Gardner's sole contention is that the trial judge erred when he sustained the United States Attorney's objection. He cites the general rule that a witness must be allowed to explain away a seeming contradiction on redirect, if possible. But petitioner misconceives what occurred at the trial. The trial judge did not prevent an explanation of the inconsistency because none was attempted. The inconsistent statement, made in a letter written in November of 1955, was that Monthly Publications, Inc., was dormant. This tended to weaken petitioner's assertion that he could not have been closely connected with the co-defendant corporation, Toys of the World Club,

Inc., because he was devoting extensive time to Monthly Publications, Inc., for the period covered in the indictment. However, the question asked petitioner on redirect, which was not allowed, asked petitioner to detail some of his activities for Monthly Publications, Inc., in early 1955. The trial judge remarked to petitioner's counsel, in sustaining the objection to the question, that there was no dispute as to that issue, and the United States Attorney concurred in that remark. It should also be noted that petitioner, on direct examination by his own counsel, stated that he spent 60% of his time at his job with Toys of the World Club, Inc., during early 1955 (R. 740).

II. A. Petitioner Kyle asserts that there is no evidence to show that, as originally devised, the scheme was one to defraud, and argues that the subsequent brochures and their promises, even though circulated at a time when the corporation was insolvent, must necessarily be taken as merely an error in business judgment. But obviously a venture which on its face appears legitimate may be a cover for a scheme to defraud; and a business that once was legitimate can become a scheme to defraud if it is knowingly used as a vehicle to deceive the public.[3] This Court long ago,

[3] There is no conflict between the Sixth Circuit and the court below as to the scope of the statute. Without attempting to distinguish the old cases in that circuit which petitioner cites (Pet. 12), it is sufficient to note the Sixth Circuit's recognition of the broad coverage of the statute in the later case of *Stone* v. *United States*, 113 F. 2d 70, 74–75.

in *Durland* v. *United States*, 161 U. S. 306, 314, held that the statute covers, not only actual misrepresentations of existing fact, but also "the allurement of a specious and glittering promise". The issue in this case was whether, at the time of the mailings charged in the indictment, petitioner was acting in good faith, even though mistaken in his business judgment, or whether he was knowingly holding out promises which he knew he could not fulfill. This issue was clearly submitted to the jury in the portion of the charge set forth above, pp. 7–8. The judge made it abundantly clear that "[t]he mere fact that the corporation did not or was unable to perform its obligations or promises, or that the subscribers suffered losses would not in and of itself constitute a crime as to any defendant". Petitioner seizes on one phrase of one paragraph of the instructions where the court, in language taken largely from *Van Riper* v. *United States*, 13 F. 2d 961, 964–965 (C. A. 2), certiorari denied *sub nom. Ackerson* v. *United States*, 273 U. S. 702, charged that a false statement recklessly made without honest belief in its truth could itself show fraud. The judge did say "without an honest belief in its truth or without reasonable ground for believing it to be true". This last phrase, as the Court of Appeals stated, probably goes too far since a person could act honestly, even though unreasonably. But reading the charge as a whole, there can be no doubt that the jury was adequately instructed as to the need to find fraudulent intent. Petitioner's counsel manifestly thought so since he failed to object to the charge. The one phrase now made the basis of objection does not con-

stitute substantial error under Rule 52, F. R. Crim. P.

B. Gardner took the stand in his own behalf and was cross-examined by Kyle's counsel. Gardner stated that returns had fallen at least 50% below anticipated returns in October, November, and December 1955 (R. 988). Approximately $200,000 came in the pre-Christmas mailings (R. 989). Counsel then asked:

> You said that was half of what you had expected and told my client and the other board of directors; is that correct?
>
> Mr. DEUTSCH. I object, your Honor.
>
> The COURT. I will sustain the objection.
>
> Q. Did you make your predictions or estimates by what you considered to be sound methods?
>
> Mr. DEUTSCH. I object, your Honor.
>
> The COURT. Yes, sustained.
>
> Q. Was the opinion which you expressed as to the returns which you expected on the pre-Christmas mailings, your honest opinion?
>
> Mr. DEUTSCH. I object, your Honor.
>
> The COURT. Sustained [R. 989–990.]

A chart of returns prepared in December 1955 by Gardner as a consultant for the corporation was then introduced into evidence over objection by the government (R. 990–994). This showed that mailings totaling 5,480,000 had been made and that returns of $418,000 had been expected (R. 994–995).

As to Kyle, there is no basis for a claim of error. His defense was that he was entitled to rely on the estimates of an expert in proceeding with the enterprise. Whether Gardner was or was not acting in good faith in making the estimates does not go to the

question of Kyle's good faith in relying on the estimate. The fact that Kyle did have the estimate was fully shown by the chart and the questions relating thereto.

C. Petitioner culls two remarks of the United States Attorney on summation and claims that he is entitled to a new trial because of them. The first of these (to which objection was made) was a statement by the United States Attorney, in reference to Kyle, that "he looks rather meek and mild now". This remark is plainly not inflammatory. The jury could see for themselves what petitioner looked like.

The second remark of the United States Attorney was not objected to at the time. The United States Attorney attempted to show the jury that the government considered the continued mailing of circulars and brochures by petitioners after they were already hopelessly unable to fulfill present orders as the clinching factor showing the nature of the fraud. In so doing, he used the example of taking money from the jurors one by one promising each in turn to deliver a lawnmower. He mentioned the first and last juror by name. He then stated:

> * * * at least you have to say by the time you reach him [the last juror], and you haven't delivered any lawnmowers, that that is a lie, that promise that you are going to deliver in exchange for money * * *. [R. 1106–1107.]

This illustration of a legal theory was neither inflammatory nor prejudicial.

CONCLUSION

It is respectfully submitted that the petitions for writs of certiorari should be denied.

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DECEMBER 1958.

U. S. GOVERNMENT PRINTING OFFICE 1958